

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of

Reexamination of the Comparative Standards  
for Noncommercial Educational Applicants

Association of America's Public Television  
Stations' Motion for Stay of Low Power  
Television Auction (No. 81)

MM Docket No. 95-31

**COMMENTS OF  
THREE ANGELS BROADCASTING NETWORK, INC.**

On behalf of Three Angels Broadcasting Network, Inc. ("3ABN"), the undersigned counsel hereby submits these comments in response to the Federal Communications Commission's ("FCC" or "Commission") *Second Further Notice of Proposed RuleMaking*<sup>1</sup> in the captioned proceeding. 3ABN respectfully submits that the Commission should refrain from establishing and implementing NCE eligibility criteria for low power television ("LPTV") licenses as it considers new procedures for licensing non-reserved spectrum for commercial and noncommercial educational applicants. Applying such requirements to the LPTV licensing process is without a sound basis in law or policy, and would produce inflexibility and an administrative burden with no corresponding benefits.

**I. Three Angels Broadcasting Network**

3ABN is a 24-hour Christian television and radio network that calls itself the "Mending Broken People Network." Its programming, which originates from its headquarters in

Thompsonville, Illinois, is transmitted via satellite to more than 100 owned or affiliated LPTV stations nationwide, making it the second largest Christian TV network in North America. 3ABN's programming is carried by numerous cable systems in 18 states (and nine foreign countries) and by schools and hospitals located throughout the United States. Its programming is also available worldwide via satellite.<sup>2</sup>

3ABN's LPTV network has been operational for 16 years and brings much more than religious programming to its many viewers. Its unique programming includes divorce recovery and alcohol rehabilitation programming, health-related and cooking programs, family and children's programs, organic gardening, documentaries, drama, entertainment and multilingual programming. 3ABN provides programming to its LPTV affiliates 24 hours per day, of which approximately eight hours per day is new programming, including a live weekly two-hour show. Many of 3ABN's stations serve minorities and communities not otherwise served by any other full power or LPTV stations. 3ABN receives literally thousands of letters each month from viewers whose lives have been touched and improved by 3ABN's programming. Some of those letters come from alcohol and drug dependent persons and even from incarcerated persons who say that 3ABN has helped better their lives. Its programming is exactly the type of “niche” programming which led the Commission to claim that LPTV programming “is more than meeting its expectations.”<sup>3</sup>

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<sup>1</sup> *In re Reexamination of the Comparative Standards for Noncommercial Educational Applicants, Association of America's Public Television Stations' Motion for Stay of Low Power Television Auction (No. 81)*, Second Further Notice of Proposed Rule Making, 17 FCC Rcd. 3833 (rel. Feb. 25, 2002) (“*Second FNPRM*”).

<sup>2</sup> A list of 3ABN's LPTV and cable affiliates can be found at [www.3abn.org/television/television\\_affiliates.html](http://www.3abn.org/television/television_affiliates.html).

<sup>3</sup> *Review of the Commission's Rules Governing the Low Power Television Service*, First Report and Order, 9 FCC Rcd. 2555 at ¶ 2 (1994).

## II. NCE Rulemaking Background

In the *Second FNPRM*, the Commission seeks comment on its proposals for awarding broadcast licenses to noncommercial educational stations, in light of the decision of the United States Court of Appeals for the District of Columbia Circuit<sup>4</sup> vacating portions of the Commission's *Order*<sup>5</sup> in this proceeding. That *Order* enabled noncommercial educational ("NCE") broadcast applicants for licenses in the unreserved spectrum to engage in competitive bidding, pursuant to Section 309(j)(2)(C) of the Communications Act of 1934, as amended (the "Act").<sup>6</sup> The D.C. Circuit held that the Commission's decision with respect to this issue was arbitrary and capricious, in violation of Section 309(j)(2) of the Act.<sup>7</sup> The D.C. Circuit held that Section 309(j)(2) forbids the Commission from requiring NCE applicants to participate in auctions, regardless of the type of license for which they apply.<sup>8</sup> The *Second FNPRM* asks what additional rules, if any, the Commission should impose to address competitive bidding for competing low power television ("LPTV") license applications.<sup>9</sup>

3ABN respectfully submits that the Commission should not impose any NCE eligibility criteria for LPTV licenses as it considers new procedures for licensing non-reserved spectrum for which commercial and noncommercial educational applicants may both apply. The Commission has never before created a NCE distinction for LPTV licenses, and the current LPTV licensing

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<sup>4</sup> See *Nat'l Public Radio v. FCC*, 254 F.3d 226 (D.C. Cir. 2001) (vacating Commission Report and Order mandating that NCE applicants for licenses in the unreserved spectrum take part in competitive auctions).

<sup>5</sup> *In re Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Report and Order, 15 FCC Rcd. 7386 (2000) ("*Report and Order*").

<sup>6</sup> See 47 U.S.C. § 309(j)(2)(C).

<sup>7</sup> *Nat'l Public Radio*, 254 F.3d at 231.

<sup>8</sup> See *id.*

<sup>9</sup> See *Second FNPRM* at ¶ 21.

scheme has enabled 3ABN and other LPTV licensees to obtain such licenses to deliver the quality programming that make them the strong broadcast assets they have become. The Commission itself recognizes that questions concerning the interpretation of Section 309(j)(2), including specifically whether the creation of new eligibility criteria for LPTV licenses falls within the scope of Section 309(j)(2)(C), constitute “perhaps the most difficult question[s] posed in this proceeding.”<sup>10</sup> It is imperative that the Commission recognizes the inflexibility and administrative burden that would inevitably result if the Commission chose to establish and apply NCE eligibility criteria to LPTV licenses without a sound basis in law and policy.

### **III. Section 309(j)(2)(C) Does Not Apply To Low Power Television Stations**

The *Second FNPRM* seeks comment regarding the application of Section 309(j)(2)(C) to LPTV and TV translator services, and if it does not apply, whether the Commission should utilize auctions for competing applications, even if the applicants meet the Commission’s general NCE eligibility criteria.<sup>11</sup> The Commission should not disturb the LPTV licensing process by attempting to distinguish between NCE and commercial applicants. The Commission does not currently license NCE entities as such for LPTV and TV translator channels. Accordingly, these licenses fall outside the scope of Section 309(j)(2)(C), which states that competitive bidding procedures shall not apply to “licenses issued by the Commission . . . for stations described in Section 397(6) of this Act.”<sup>12</sup> Section 397(6) of the Communications Act of 1934, as amended, defines a “noncommercial educational broadcast station” and “public broadcast station” as

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<sup>10</sup> *Report and Order* at ¶ 101.

<sup>11</sup> *Second FNPRM* at ¶ 21.

<sup>12</sup> 47 U.S.C. § 309(j)(2)(C).

a television or radio broadcast station which –

(A) under the rules and regulations of the Commission *in effect on the effective date of this paragraph*, is eligible to be licensed by the Commission as a noncommercial educational radio or television broadcast station and which is owned and operated by a public agency or nonprofit private foundation, corporation, or association; or

(B) is owned and operated by a municipality and which transmits only noncommercial programs for educational purposes.<sup>13</sup>

As the *Second FNPRM* acknowledges, LPTV licenses are open to all entities that meet the licensing requirements and are not specifically issued or reserved for NCE stations.<sup>14</sup> As a policy matter, the Commission should not change that now for the reasons described in Section A below. More importantly, however, the Commission lacks the statutory authority to change that since that was the case “on the effective date of this paragraph.” (See Section B below)

**A. Establishing New NCE Criteria For LPTV Station Applicants Would Disserve the Public Interest**

LPTV is a secondary television service<sup>15</sup> that has never come within the scope of Section 397(6) of the Communications Act, as amended. To include them now would not further the public interest. To refrain from imposing new NCE regulations would yield greater flexibility for LPTV applicants.

The Commission can and should continue to utilize competitive bidding procedures to resolve competing applications for LPTV, even if such applications are filed by entities who would otherwise qualify under the general NCE eligibility criteria set forth in the rules. This would provide greater flexibility to those NCEs who wish to obtain LPTV licenses, as opposed

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<sup>13</sup> See 47 U.S.C. § 397(6) (emphasis added).

<sup>14</sup> *Second FNPRM* at ¶ 21.

<sup>15</sup> See, e.g., *Establishment of a Class A Television Service*, Report and Order, 15 FCC Rcd. 6355 at ¶ 2 (2000).

to precluding them from auctions altogether.<sup>16</sup> 3ABN seeks to preserve its right to compete against commercial applicants for LPTV licenses. 3ABN has found competitive bidding to be an efficient process for awarding LPTV licenses. Entities such as 3ABN could find themselves barred from bidding on new stations if they qualify under NCE rules. This situation would substantially restrict 3ABN's LPTV licensing options.

The Commission's proposal to classify *existing* LPTV licensees as NCEs also could further limit LPTV broadcast services.<sup>17</sup> This proposal is undesirable, as it would place a burdensome limitation on LPTV stations, such as those owned by 3ABN, by automatically preventing them from bidding for LPTV licenses where commercial entities have also applied. Such a rule would block existing LPTV stations from acquiring such licenses and likely relegate them to a much smaller pool of licenses to be awarded according to other less desirable criteria. This scenario illustrates the limited options 3ABN and other similarly-situated broadcasters would face if the Commission created NCE classifications for LPTV.

Moreover, the Commission's forbearance from imposing new NCE regulations would avoid entangling the Commission in the difficult administrative task of determining eligibility criteria for LPTV station bidding. The Commission currently has no NCE eligibility criteria for LPTV applicants. The questions posed in the *Second FNPRM* seem to recognize the inherent difficulties in trying to carve out new rules and requirements in the event the Commission attempted to bring LPTV within the scope of Section 309(j)(2)(C) to exempt NCE applicants

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<sup>16</sup> The D.C. Circuit has held that this must be the case if the Commission were to establish NCE licensing requirements for such facilities. In construing Section 309(j)(2)(C), the Court rejected the Commission's rules applying the bidding procedures only to the unreserved portions of channels, flatly stating: "[w]e thus have no reason to believe that Congress meant anything other than that the Commission may not require NCEs to participate in auctions, *regardless of the type of license they seek.*" See *Nat'l Public Radio*, 254 F.3d at 231.

<sup>17</sup> See *Second FNPRM* at ¶ 21.

from competitive bidding.<sup>18</sup> To embark on this course with no clear policy need could “scramble the NCE egg” and inject uncertainty into the well-functioning LPTV licensing process.

Further, creating new NCE eligibility criteria for LPTV licenses would not address the Commission’s concern of giving “full effect” to the D.C. Circuit’s *National Public Radio* decision. There, the Court merely stated that, where the Commission establishes NCE broadcast stations for various broadcast services, under no circumstances may the NCE applicant participate in competitive bidding for such licenses.<sup>19</sup> LPTV services, however, have never been licensed as NCE entities. Thus, excluding LPTV from competitive bidding does not run afoul of the Court’s opinion in *National Public Radio*.

Therefore, there is no court mandate or any other compelling public interest reason for attempting to shoehorn LPTV into the NCE context now.

**B. The Commission Is Without Statutory Authority To Establish New NCE Criteria For LPTV Station Applicants**

In the *Second FNPRM*, the Commission asks whether it has the statutory authority to adopt new NCE eligibility criteria to exempt NCE applicants from competitive bidding for LPTV stations.<sup>20</sup> In fact, it does not. Section 397(6), which applies to those stations in the noncommercial band of spectrum and not to LPTV, bases its exemption from the competitive bidding requirements on the “rules and regulations of the Commission in effect on the effective date of” the section, *i.e.*, November 2, 1978. Therefore, Section 309(j)(2)(C)’s exemption from competitive bidding applies only to those stations that were eligible as NCEs under Commission

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<sup>18</sup> *See id.*

<sup>19</sup> *See id.*

<sup>20</sup> *See id.*

rules and regulations as of November 2, 1978. Even if the Commission were to establish new NCE eligibility criteria for LPTV station applicants in this rulemaking, such criteria obviously would not have been in effect as of 1978, and could not be made retroactive. Accordingly, any new NCE eligibility requirements for LPTV stations would fall outside the scope of Section 397(6) of the Act, and thus, still would not be exempted from competitive bidding under Section 309(j)(2)(C).

#### **IV. Conclusion**

For the foregoing reasons, 3ABN respectfully requests that the Commission follow its proposal and refrain from applying NCE eligibility criteria to LPTV broadcast applicants when awarding licenses for competing applications.

Respectfully submitted,

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